

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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SD PROTECTION, INC.,

Plaintiff,

MEMORANDUM AND ORDER

06-CV-5571 (RRM) (RML)

- against -

EDWARD DEL RIO,

Defendant.

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MAUSKOPF, United States District Judge.

In an Order and Report and Recommendation dated September 10, 2008, Magistrate Judge Robert M. Levy recommended that all of Plaintiff's claims be dismissed for failure to prosecute, pursuant to Federal Rule of Civil Procedure 41(b). See Docket No. 31; see also Minute Entry dated April 24, 2008. Plaintiff SD Protection, Inc. has filed no objection to any portion of Judge Levy's Report and Recommendation.

Upon this Court's review of the record, and based upon the conclusions set forth in Judge Levy's Report and Recommendation, to which Plaintiff makes no objection, see Thomas v. Arn, 474 U.S. 140, 150 (holding that a district court need not review factual or legal conclusions of a magistrate judge as to which no objections are addressed), the said Report and Recommendation is hereby adopted in its entirety.

Dismissal under Rule 41(b) is a harsh remedy that is appropriate only in extreme cases. Spencer v. Doe, 139 F.3d 107, 112 (2d Cir. 1998). In determining whether dismissal is appropriate for a plaintiff's failure to comply with a court order, courts consider: (i) the duration of the plaintiff's failure to comply; (ii) whether the plaintiff had notice that failure to comply would result in dismissal; (iii) whether the defendants are likely to be prejudiced by further delay

in the proceedings; (iv) a balancing of the court's interest in managing its docket with the plaintiff's interest in receiving a fair chance to be heard; and (v) whether the judge has adequately considered a sanction less drastic than dismissal. Spencer, 139 F.3d at 112-13 (citations omitted).

Here, (i) Plaintiff has failed to comply with Judge Levy's discovery orders for at least six months; (ii) Plaintiff has been on notice since April 24, 2008 that its failure to comply with Court Orders would result in dismissal; (iii) Judge Levy's April 24, 2008 order found, and Plaintiff did not contest, that Plaintiff's continuing failure to comply with the Court's Orders has caused – and is still causing – prejudice to Defendant; (iv) Plaintiff's "claim on the Court's time is undermined by [its] failure to comply with [its] discovery obligations," see Ayodele v. N.Y. Police Dep't, No. 07 Civ. 8573 (PKC) (JCF), 2008 U.S. Dist. LEXIS 92565, at \* 6-7 (S.D.N.Y. Nov. 10, 2008); and (v) Judge Levy not only considered sanctions less drastic than dismissal, but repeatedly attempted to compel Plaintiff's compliance with the Court's Orders through less drastic remedies, all to no avail.

Even today, Plaintiff remains in violation of Judge Levy's discovery orders (e.g., Judge Levy's March 4, 2008 and April 2, 2008 Orders to produce an unredacted copy of the e-mail attached to the Complaint or provide a satisfactory reason for failing to do so) as well as Judge Levy's sanctions orders. Indeed, the Court has held Plaintiff in civil contempt in a separate Memorandum and Order issued concurrently herewith, based on Plaintiff's consistent failure to comply with Court Orders.

For the foregoing reasons, all claims brought by Plaintiff SD Protection, Inc. against Defendant Edward Del Rio are hereby DISMISSED with prejudice, pursuant to Federal Rule of

Civil Procedure 41(b).

SO ORDERED.

Dated: Brooklyn, New York  
November 21, 2008

s/RRM

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ROSLYNN R. MAUSKOPF  
United States District Judge